No. 292

In the

Supreme Court of the United States

OCTOBER TERM, 1960

KENNETH C. BIVINS,

Petitioner,

v.

GULF OIL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A of Petition) is reported at 276 F. 2d 753.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals applied the applicable rules of Texas substantive law to the case in reaching the conclusion that Respondent fully discharged any duty that it might have owed to Petitioner?

2. Whether Petitioner's rights under the Seventh Amendment to the Constitution of the United States have been violated?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States (Seventh Amendment thereto) and the statute involved, the *Rule of Decision Act (28 U. S. C., Section 1652)*, are set forth in the petition, at page 3.

STATEMENT

Prior to the accident giving rise to this suit, Respondent entered into a written contract with White Well Service, owned by Ray White, providing the terms under which White Well Service, as an independent contractor, would perform lease work for Respondent (R. 105, 208; Appendix A). Under this agreement the service company was given authority to *control* and *direct* the performance of the details of the work, and it was required to furnish all safety appliances needed by its employees (Appendix A, Par. 5 and 6).

On the date of the accident, Respondent's production foreman, Lawrence Griffin, gave a work order to Ray White requiring a pulling unit and crew at an oil well in Ward County, Texas (R. 71). The White crew consisted of Petitioner, an experienced oil field roustabout (R. 113), his two brothers and a cousin Billy Fine, the unit operator (R. 29, 143). Upon arriving at the well site the premises were safe and no gas was leaking (R. 44, 129, 130). Mr. Griffin acknowledged that there existed in some wells in the oil field involved an iron sulfide condition which might start burning when exposed to the air (R. 79). The condition could not be determined to exist in any particular well until it was disconnected and the condition actually observed (R. 81, 118, 126, 137).

Mr. White, Petitioner's employer, was warned about the condition when he commenced working for Gulf and was continually warned thereafter (R. 83, 112). The unit operator, Petitioner's supervisor, was warned about the condition on the very day of the accident by both Mr. White and Mr. Griffin, with the warning from Mr. Griffin being given while Petitioner was present and in hearing distance of the conversation (R. 112, 126, 127). Petitioner himself acknowledged that he had been warned as to a fire hazard from gas (R. 60, 61).

The fire occurred after the well was opened up and the gas blown off (R. 53). At that time Petitioner was in the cellar of the well disconnecting the flange on the casing head (R. 32). No one knew what caused the incident which occurred (R. 53, 114, 130).

Respondent exercised no control or supervision over the performance of the details of the work, and White's unit operator was in charge of the work (R. 62, 92, 114, 131). There were no employees of Respondent present when the service company moved its equipment onto the location or when the fire occurred (R. 43, 62, 127).

At the conclusion of the case Respondent presented its motion for instructed verdict which was overruled (R. 174-181), and upon submission of the case to the jury requested an instruction to the effect that their verdict would be for Gulf Oil Corporation if warning of the alleged danger was given to Bivins' employer or supervisor (R. 186, 187 No. 10). Admittedly this warning had been given to both of these persons (R. 112, 126, 127). Objections made to other instructions were overruled and Judgment was entered for Petitioner, upon the verdict. The Fifth Circuit Court of Appeals determined that Respondent, through proper warning, discharged its duty to Petitioner and reversed and rendered Judgment for Respondent.

ARGUMENT

The Court of Appeals correctly applied the applicable substantive law of the State of Texas in determining that Respondent discharged any duty owed to Petitioner.

From the earliest cases to the most recent decisions, all Texas authority is in accord with and fully supports the decision by the Court of Appeals. In the earliest case, whether the issue of duty to warn was discussed, *Proctor*

v. San Antonio St. Ry. Co. (Tex. Civ. App., 1901), 62 S. W. 939, 940, the court said that "no duty of warning deceased of the danger rested upon defendant" (owner of the premises). It was pointed out that if any one owed the duty to give warning of the danger, such duty rested upon the independent contractor. The Texas Supreme Court denied the Application for Writ of Error in the *Proctor Case*.

One of the most recent cases to consider the question of duty to warn is *Nance Exploration Co. v. Texas Employers' Ins. Ass'n. (Tex. Civ. App., 1957, writ of error refused, N. R. E.), 305 S. W. 2d 621, cert. den. 358 U. S. 908, 3 L. Ed. 2d 229*. In that case one of the grounds upon which the trial court entered judgment was a finding by the jury that the Defendant failed to warn the injured workman that he was working in an intrinsically and inherently dangerous place.

Citing a case by the Supreme Court of Texas as authority, the Court reversed and rendered judgment for defendant stating:

> "Furthermore, if appellee was entitled to a warning of the danger, he had received that warning because his superior, Bailey, under the undisputed evidence, knew of said danger and, under the undisputed evidence, had warned Greer of the danger. Therefore, both of appellee's superiors knew of the danger, and, under the last quotation from McKee v. Patterson, supra, that amounted to knowledge of the danger on the part of appellee." *305 S. W. 2d 621, 626.*

Likewise in the case at bar, both of Petitioner's superiors, Mr. White and Mr. Fine, had been warned and they knew of any danger which existed. (R. 112, 126, 127.)

This same rule of Texas law was clearly recognized and properly applied by the Court of Appeals in *Union Tank & Supply Co. v. Kelley (C. A., 5th Cir., 1948), 167 F. 2d 811, cert. den. 335 U. S. 828, 93 L. Ed. 381*, where the court pointed out the duty to warn the employee rested upon his employer, not the contractee.

In *Texas Electric Service Co. v. Holt (Tex. Civ. App., 1952, writ refused, N. R. E.), 249 S. W. 2d 662, 667*, the Texas Courts recognized that "It is seldom an employer knows the employees of his independent contractor." In view of this recognized fact, to hold that the defendant contractee must give notice of a possible danger to every employee would exceed all reasonable bounds. *Storm v. New York Telephone Co., 270 N. Y. 103, 200 N. E. 659.*

There is no question but that any duty owed by the lessor-contractee can be discharged by proper warning. *57 C. J. S. 378, Prosser on Torts, 2nd Ed., p. 452.* Common sense, logic and all authorities recognize that this warning only need be given to the independent contractor (who knows the employees) or his supervisor (who works the employees) and they in turn must pass the necessary warning on to the workman with whom they are in constant contact.

Petitioner's rights under the Seventh Amendment of the Constitution have not been violated.

In Texas, "Negligence is a failure to observe a legal duty" and "* * * to constitute negligence at all, there must be a violation of a duty owed to the very person claiming on the ground of negligence." *30-B Texas Jurisprudence 175.* And "Where the evidence is of such character that there is no room for reasonable and ordinary minds to differ as to the conclusion to be drawn from it the court not only may but has a duty to direct a verdict." *Texas Law of Evidence, McCormick and Ray, 2nd Ed., Vol. 1, p. 9.* Since the evidence showed without dispute, that Respondent had warned both Petitioner's employer and supervisor; and since under the applicable Texas law, that was all that was necessary for Respondent to discharge any duty to Petitioner, there was nothing to submit to the jury and the Court of Appeals correctly determined that the trial court should have instructed a verdict for Respondent. See *Tompkins v. Erie R. Co. (C. A. 2nd Cir., 1938), 98 F. 2d 49, cert. den. 305 U. S. 637, 83 L. Ed. 410, rehearing denied 305 U. S. 673, 83 L. Ed. 436.*

Respondent in this case has shown that it was entitled to a directed verdict which clearly does not violate the Seventh Amendment to the Constitution, although it does deny jury verdict. See *Galloway v. United States, 319 U. S. 372, 87 L. Ed. 1458.*

There is no conflict in the decisions.

The Petition for Writ of Certiorari is based solely upon the decision in *Galveston-Houston Ry. Co. v. Reinle (Tex. Sup. Ct., 1924), 258 S. W. 803.* That case is not applicable!

It must be recognized that the duty owed by an invitor to an invitee is based upon the fact that the one in *possession* and *control* of the premises is best able to inspect the premises, know the defects and then make the premises safe or give adequate warning. That duty does not remain absolute when the owner or leaseholder is no longer in possession.

In discussing this duty to keep the premises safe in a similar type case where the lessee had placed its independent contractor in control of the work and premises, Chief Judge Hutcheson in *Gulf Oil Corporation v. Wright (C. A. 5th Cir., 1956). 236 F. 2d 46,* said:

> "Neither, since Gulf did not retain control over the premises or the work, was it under any duty of care to maintain the premises in a safe condition, that duty was Zephyr's." *236 F. 2d 46, 57.*

In a recent case decided by a Texas Court judgment based on a jury verdict was reversed and rendered for the defendant on the same grounds. In *Houston Pipe Line Company v. Peddy (Tex. Civ. App. 1956, writ refused, N. R. E.), 292 S. W. 2d 364,* the plaintiff, while employed by an independent contractor, was injured while replacing a defective pipe line on defendant's premises. It was plaintiff's contention that as an invitee, defendant owed to him the

duty to protect him from danger or perils of which defendant had superior knowledge. Having concluded that the plaintiff's employer was an independent contractor over whom defendant retained no right of control, the Court said, in regard to the alleged duty to warn of dangers:

> "That principle of law is not applicable here. The undisputed evidence is that the Construction Company went into possession of the premises for the purpose of removing defective pipe and replacing it with new pipe, and further the Construction Company, by the use of its own equipment which was oprated by its own employees, made all the alterations which were made on the premises and which changed it from the condition in which it was when the Construction Company took charge." *292 S. W. 2d 364, 367.*

In *Galveston-Houston Electric Railway Co. v. Reinle (Tex. Sup. Ct. 1924), 258 S. W. 803*, the defendant's duties were based not only upon its *possession and control* of the premises, but also upon the fact that the defendant was continuing to operate its electric railway while the work was being done and was "knowingly keeping in operation a force" that was dangerous to the workmen. The duty arose out of the defendant's control of the electric line and its affirmative act in continuing to operate the electric line while the work was being done. The court made it clear that the duty which was there imposed was a duty resting upon "the owner or occupant of real estate", "a company controlling premises", "the user of wires charged with electricity", "Electric companies" and the person having "premises in his possession and under his control". These facts distinguish the *Reinle case* from the case here.

Likewise in *Smith v. Henger (Tex. Sup. Ct., 1950), 226 S. W. 2d 425*, cited at page 10 of the Petition, the Court said:

> "* * * the duty to keep premises in a safe condition is imposed on a *person in control* of them, * * *." *226 S. W. 2d 425, 431.* (Emphasis added.)

A reading of these cases makes it obvious that the Court of Appeals correctly determined and properly applied the applicable substantive law of the State of Texas and cases relied upon by Petitioner are clearly not applicable.

Petitioner's meaningless attack at page 13 of the Petition upon the Court which has correctly decided more third-party cases[1] than any other court, is without basis in the law of this State.

Finally, it must be noted that the Court of Appeals was in agreement that the Trial Court erred in its instruction to the jury and the Petition presenting no challenge to that ruling, the decision must stand as a proper determination of the applicable law requiring the results reached in the Court of Appeals.

CONCLUSION

The Court of Appeals correctly determined and properly applied the applicable law from the State of Texas. There

[1] Kuptz v. Ralph Sollitt & Sons Const. Co., 88 F. 2d 532; Dennis v. Mabee, 137 F. 2d 941; Holt v. Texas-New Mexico Pipeline Co., 145 F. 2d 862; Cook v. Phillips Petroleum Co., 158 F. 2d 10; Union Tank & Supply Co. v. Kelley, 167 F. 2d 811; United Gypsum Co., Inc. v. Balfanz, 193 F. 2d 1; Thompson v. Rowan Drilling Co., Inc., 197 F. 2d 32; Cagle v. McQueen, 260 F. 2d 186; Carroll v. Magnolia Petroleum Company, 223 F. 2d 657; Phillips v. Gibson, 232 F. 2d 13; Sword v. Gulf Oil Corporation, 251 F. 2d 829, and Hurst v. Gulf Oil Corporation, 251 F. 2d 836.

being no federal law or question involved in this case, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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TURPIN, KERR, SMITH & DYER,
P. O. Box 913,
Midland, Texas,
Of Counsel.

CERTIFICATE OF SERVICE

Copy of the foregoing was deposited in the United States mail at Midland, Texas, in properly stamped envelope addressed to counsel for Petitioner, viz., Warren Burnett, Esq., at his post office address, P. O. Box 3707, Odessa, Texas; and Philip S. Kouri at his post office address, Oil & Gas Building, Wichita Falls, Texas, this day of August, 1960. This I certify.

WILLIAM L. KERR,
300 First National Bank Bldg.,
Midland, Texas.

APPENDIX "A"

Approved as to Form
JHB
11 28 51

BLANKET CONTRACT

Fort Worth, Texas
November 26, 1951
Contract No. FW-3081

White Well Service
P. O. Box 478
Grandfalls, Texas

Gentlemen:

This is to confirm our understanding with you concerning any kind of work you may be requested to perform from time to time for GULF OIL CORPORATION, hereinafter called "Gulf", as an independent contractor in the State of Texas, from November 6, 1951 to November 6, 1952, and as long thereafter as necessity for same continues; it being understood and agreed that either party may cancel this contract by giving the other party ten (10) days written notice of such cancellation; but neither party hereto shall by the termination of this agreement be relieved of its or his respective liabilities arising from or incident to work performed hereunder prior to the time such contract is terminated.

1. Description of Work:

The jobs contemplated to be done by you are well servicing, paraffin scraping, roustabout and dirt work and such other jobs as are generally performed by you in your usual line of service. The jobs to be performed will be indicated

by TRANSPORTATION TICKETS, FIELD WORK ORDERS AND PURCHASE ORDERS of Gulf, duly signed by an authorized representative of Gulf and directed to you as "Contractor".

2. Begin Work:

Contractor agrees to begin each particular job covered by this contract within five (5) days after the receipt by Contractor of Gulf's TRANSPORTATION TICKET, FIELD WORK ORDER, or PURCHASE ORDER.

3. Delivery Tickets:

Delivery Tickets covering any material or supplies furnished by or chargeable to Gulf at any job performed hereunder shall be turned in to the Gulf office each day with the Contractor's work ticket. The quantity, description, and condition of materials and supplies so furnished shall be checked by Contractor or by Contractor's representative, and the tickets shall be properly certified by Contractor or by Contractor's representative.

4. Price Schedules:

Gulf will pay Contractor for jobs performed or services rendered hereunder in accordance with schedule of prices attached hereto and made a part of this contract. It is understood that the rates and prices set forth in the attached schedule of prices are subject to change by either party upon ten (10) days written notice to the other party. The rates to be paid to Contractor by Gulf for the actual per-

formance of the work shal be in lieu of any charges for materials or supplied furnished by Contractor for use in the work and any charges for transportation of tools, equipment and labor or time required to transport tools, equipment and labor to and from the job, unless otherwise specified in the schedule of prices.

5. Foreman, Labor, Equipment, Supplies and Services:

Contractor shall at Contractor's expense furnish foreman, if required, and all labor, equipment, machinery, tools and supplies necessary to perform all jobs and services hereunder in a workmanlike and diligent manner. As an independent contractor, you also agree and obligate yourself to comply with all laws, rules and regulations, Federal, State and Municipal, which now are, or in the future may be, applicable to your business, equipment and employees engaged in your operations in any manner connected with your performance hereunder. Contractor shall provide and have available at all times for use by Contractor's employees engaged in the performance of the work herein undertaken, all safety appliances needed for the maximum protection of Contractor's employees against injuries.

6. Independent Contractor Relationship:

In the performance of the work herein contemplated Contractor is an independent contractor, with the authority to control and direct the performance of the details of the work, Gulf being interested only in the results obtained. But the work contemplated herein shall meet the approval

of Gulf and be subject to the general right of inspection herein provided to Gulf to secure the satisfactory completion thereof.

7. Indemnifying Provisions:

Contractor agrees:

to pay off all just claims for labor, materials, and supplies furnished by Contractor hereunder; to pay all carrier's and cartmen's charges; and to allow no lien or charge to become fixed upon any property of Gulf;

to pay all claims for damages to property in any manner arising from Contractor's operations hereunder;

to comply with all laws, rules and regulations, Federal, State, Municipal, which are now, or may in the future become applicable to Contractor, Contractor's business, equipment and personnel engaged in operations covered by this instrument, or accruing out of the performance of such operations;

to pay any and all claims which may be asserted or assessed against Gulf because of any infraction or violation of any Federal, State, or Municipal law, rule or regulation, or for nonpayment of taxes, which are now or may in the future become applicable to Contractor, Contractor's business or personnel, arising from Contractor's operations hereunder, or operations of any sub-contractor to whom Contractor may have sublet any phase of it;

to protect and hold Gulf harmless from all claims for damage and compensation made or asserted by employees

of Contractor or of any sub-contractor, or any of them, or any of their dependents, or by Contractor or by sub-contractor or any agent or representative of either, or the dependents of any of them, or by any other person, against Gulf on account of personal injuries or death suffered by them or by any of them, whether arising from an act of negligence upon the part of Gulf or otherwise, in anywise associated with or related to this contract, and to that end Contractor agrees to take out and keep in force Workmen's Compensation Insurance, with some insurance company, acceptable to Gulf, authorized to do business in the State of Texas, covering all of Contractor's employees and all employees of any sub-contractor engaged in the work to be performed hereunder;

and Contractor further agrees to take out and keep in force such other insurance and indemnity as is necessary for Gulf's full protection against any claim which may be asserted under the provisions hereof, and for its protection against loss for the payment of any such claim;

this agreement to indemnify and save Gulf harmless is in addition to Contractor's acceptance of general liability as an independent contractor hereunder.

8. **Insurance:**

Contractor agrees to carry, with an insurance company satisfactory to Gulf, Public Liability Insurance with limits of $25,000.00 each person and $50,000.00 each accident; Property Damage Insurance with limits of $10,000.00 each accident and $25,000.00 per policy; Automobile and Truck

Public Liability Insurance with limits of $50,000.00 each person and $100,000.00 each accident; and Automobile and Truck Property Damage Insurance with limit of $5,000.00 each accident, with an insurance company authorized to do business in the State of Texas. Certificates of insurance coverage shall be furnished Gulf before this contract is accepted by Gulf.

9. Acceptance of Contract:

To evidence your conformity and acceptance of the obligations assumed by you hereunder, please execute and return to us one of the duplicate originals of this agreement.

Yours truly,
GULF OIL CORPORATION
By /s/ T. E. Harfield
Manager of Exploration

ACCEPTED AND APPROVED:
WHITE WELL SERVICE

By /s/ O. R. White
Owner